

## SB0121S01 compared with SB0121

~~{deleted text}~~ shows text that was in SB0121 but was deleted in SB0121S01.

Inserted text shows text that was not in SB0121 but was inserted into SB0121S01.

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Senator Daniel Hemmert proposes the following substitute bill:

### CONTROLLED BUSINESS IN TITLE INSURANCE REPEAL

2019 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Daniel Hemmert**

House Sponsor: ~~{\_\_\_\_\_}~~ Mike Schultz

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#### LONG TITLE

##### General Description:

This bill ~~{repeals}~~ modifies provisions related to title insurance.

##### Highlighted Provisions:

This bill:

- ▶ ~~{repeals}~~ defines terms;
- ▶ enacts provisions that govern affiliated business arrangements involving a title licensee;
- ▶ with certain exceptions, adopts the federal Real Estate Settlement Procedures Act as the state law governing affiliated business arrangement involving a title licensee;
- ▶ provides that the Division of Real Estate shall enforce the provisions of the ~~{Insurance Code that prohibit title business referrals from certain persons who have a financial interest}~~ bill

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- ▶ requires a title licensee to submit an annual report to the Division of Real Estate related to the titled entity's affiliated business arrangements and capitalization during the previous calendar year;
- ▶ allows the Division of Real Estate to enforce certain provisions of the federal Real Estate Settlement Procedures Act against real estate licensees;
- ▶ repeals existing provisions governing controlled business relationships in the title ~~insurance entity to which the person refers the title business~~ industry; and
- ▶ makes technical changes.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

#### AMENDS:

31A-23a-504, as last amended by Laws of Utah 2015, Chapter 330

61-2f-401, as last amended by Laws of Utah 2018, Chapter 213

#### ENACTS:

31A-23a-1101, Utah Code Annotated 1953

31A-23a-1102, Utah Code Annotated 1953

31A-23a-1103, Utah Code Annotated 1953

31A-23a-1104, Utah Code Annotated 1953

31A-23a-1105, Utah Code Annotated 1953

31A-23a-1106, Utah Code Annotated 1953

31A-23a-1107, Utah Code Annotated 1953

#### REPEALS:

**31A-23a-503**, as last amended by Laws of Utah 2013, Chapter 319

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. ~~{Repealer.}~~ ~~{ This bill repeals: }~~ Section ~~{31A-23a-503,~~

**Controlled business in title insurance:**

**{31A-23a-504 is amended to read:**

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### 31A-23a-504. Sharing commissions.

(1) (a) Except as provided in Subsection 31A-15-103(3), a licensee under this chapter or an insurer may only pay consideration or reimburse out-of-pocket expenses to a person if the licensee knows that the person is licensed under this chapter as to the particular type of insurance to act in Utah as:

- (i) a producer;
- (ii) a limited line producer;
- (iii) a consultant;
- (iv) a managing general agent; or
- (v) a reinsurance intermediary.

(b) A person may only accept commission compensation or other compensation as a person described in Subsections (1)(a)(i) through (v) that is directly or indirectly the result of an insurance transaction if that person is licensed under this chapter to act as described in Subsection (1)(a).

(2) (a) Except as provided in Section 31A-23a-501, a consultant may not pay or receive a commission or other compensation that is directly or indirectly the result of an insurance transaction.

(b) A consultant may share a consultant fee or other compensation received for consulting services performed within Utah only:

- (i) with another consultant licensed under this chapter; and
- (ii) to the extent that the other consultant contributed to the services performed.

(3) This section does not prohibit:

(a) the payment of renewal commissions to former licensees under this chapter, former Title 31, Chapter 17, or their successors in interest under a deferred compensation or agency sales agreement;

(b) compensation paid to or received by a person for referral of a potential customer that seeks to purchase or obtain an opinion or advice on an insurance product if:

- (i) the person is not licensed to sell insurance;
- (ii) the person does not sell or provide opinions or advice on the product; and
- (iii) the compensation does not depend on whether the referral results in a purchase or sale; or

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(c) the payment or assignment of a commission, service fee, brokerage, or other valuable consideration to an agency or a person who does not sell, solicit, or negotiate insurance in this state, unless the payment would constitute an inducement or commission rebate under Section 31A-23a-402 or 31A-23a-402.5.

(4) (a) In selling a policy of title insurance, sharing of commissions under Subsection (1) may not occur if it will result in:

(i) an unlawful rebate; or

~~[(ii) compensation in connection with controlled business; or]~~

~~[(iii)] (ii) payment of a forwarding fee or finder's fee.~~

(b) A person may share compensation for the issuance of a title insurance policy only to the extent that the person contributed to the examination of the title or other services connected with the title insurance policy.

(5) This section does not apply to:

(a) a bail bond producer or bail enforcement agent as defined in Section 31A-35-102 and as described in Subsection 31A-23a-106(2)(c);

(b) a travel retailer registered pursuant to Part 9, Travel Insurance Act; or

(c) a nonlicensed individual employee or authorized representative of a licensed limited line producer who holds one or more of the following limited lines of authority as described in Subsection 31A-23a-106(2)(c):

(i) car rental related insurance;

(ii) self-service storage insurance;

(iii) portable electronics insurance; or

(iv) travel insurance.

Section 2. Section 31A-23a-1101 is enacted to read:

### **Part 10. Affiliated Business in Title Insurance**

#### **31A-23a-1101. Definitions.**

As used in this part:

(1) "Affiliated business" means the gross transaction revenue of a title licensee's title insurance business in the state that is the result of an affiliated business arrangement.

(2) "Affiliated business arrangement" means the same as that term is defined in 12 U.S.C. Sec. 2602.

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(3) "Associate" means the same as that term is defined in 12 U.S.C. Sec. 2602.

(4) "Division" means the Division of Real Estate created in Section 61-2-201.

(5) "Essential function" means:

(a) examining and evaluating, based on relevant law and title insurance underwriting principles and guidelines, title evidence to determine the insurability of a title and which items to include or exclude in a title commitment or title insurance policy to be issued;

(b) preparing and issuing a title commitment or other document that:

(i) discloses the status of the title as the title is proposed to be insured;

(ii) identifies the conditions that must be met before a title insurance policy will be issued; and

(iii) obligates the insurer to issue a title insurance policy if the conditions described in Subsection (5)(b)(ii) are met;

(c) clearing underwriting objections and taking the necessary steps to satisfy any conditions to the issuance of a title insurance policy;

(d) preparing the issuance of a title insurance policy; or

(e) handling the closing or settlement of a real estate transaction when:

(i) it is customary for a title licensee to handle the closing or settlement; and

(ii) the title licensee's compensation for handling the closing or settlement is customarily part of the payment or retention from the insurer.

(6) "New or newly affiliated title licensee" means a title licensee that:

(a) is licensed as a title licensee for the first time on or after May 14, 2019; or

(b) (i) is licensed as a title licensee before May 14, 2019; and

(ii) enters into an affiliated business arrangement for the first time on or after May 14, 2019.

(6) "Ownership affiliated business arrangement" means an affiliated business arrangement based on a person or a person's affiliate having a direct or beneficial ownership interest of more than 1% in a title licensee.

(7) "RESPA" means the federal Real Estate Settlement Procedures Act, 12 U.S.C. Sec. 2601 et seq. and any rules made thereunder.

(8) "Section 8 of RESPA" means 12 U.S.C. Sec. 2607 and any rules promulgated thereunder.

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(9) "Sufficient capital and net worth" means:

(a) for a new or newly affiliated title licensee:

(i) \$100,000 for the first five years after becoming a new or newly affiliated title licensee; or

(ii) after the first five years after becoming a new or newly affiliated title licensee, the greater of:

(A) \$50,000; or

(B) on February 1 of each year, an amount equal to 5% of the title licensee's average annual gross revenue over the preceding two calendar years, up to \$150,000; or

(b) for title licensee licensed before May 14, 2019, who is not a new or newly affiliated title licensee:

(i) beginning on February 1, 2020, an amount equal to 0.5% of the title licensee's average annual gross revenue over the preceding two calendar years, increasing by an amount equal to 0.5% of the title licensee's annual gross revenue over the preceding two calendar years each February 1 thereafter until February 1, 2029, up to \$150,000; and

(ii) beginning on February 1, 2029, the greater of:

(A) \$50,000; or

(B) an amount equal to 5% of the title licensee's average annual gross revenue over the preceding two calendar years, up to \$150,000.

(10) (a) "Title evidence" means a written or electronic document that identifies and describes or compiles the documents, records, judgments, liens, and other information from the public records relevant to the history and current condition of a title to be insured.

(b) "Title evidence" does not include a pro forma commitment.

(11) "Title licensee" means the same as that term is defined in Section 31A-2-402.

Section 3. Section 31A-23a-1102 is enacted to read:

**31A-23a-1102. Regulation of affiliated business -- Applicable law.**

(1) Except as provided in this part, for purposes of state law, Section 8 of RESPA governs an affiliated business arrangement involving a title licensee.

(2) The division shall enforce the provisions of this part, including Section 8 of RESPA.

(3) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the

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division may make rules necessary to implement the provisions of this part.

Section 4. Section 31A-23a-1103 is enacted to read:

### **31A-23a-1103. Affiliated business arrangements.**

(1) An affiliated business arrangement between a person and a title licensee violates Section 8 of RESPA for purposes of state law if:

(a) the title licensee does not have sufficient capital and net worth in a reserve account in the title licensee's name; or

(b) more than 70% of the title's licensee's annual title insurance business is affiliated business on or after the later of:

(i) two years after a title licensee begins an affiliated business arrangement; or

(ii) June 1, 2021.

(2) In addition to Subsection (1), the division may find that an affiliated business arrangement between a person and a title licensee violates Section 8 of RESPA after evaluating and weighing the following factors in light of the specific facts before the division:

(a) whether the title licensee:

(i) is staffed with its own employees to conduct title insurance business;

(ii) manages its own business affairs;

(iii) has a physical office for business that is separate from any associate's office and pays market rent;

(iv) provides the essential functions of title insurance business for a fee, including incurring the risks and receiving the rewards of any comparable title licensee; and

(v) performs the essential functions of title insurance business itself;

(b) if the title licensee contracts with another person to perform a portion of the title licensee's title insurance business, whether the contract:

(i) is with an independent third party; and

(ii) provides payment for the services that bears a reasonable relationship to the value of the services or goods received; and

(c) whether the person from whom the title licensee receives referrals under the affiliated business arrangement also sends title insurance business to other title licensees.

Section 5. Section 31A-23a-1104 is enacted to read:

### **31A-23a-1104. Annual affiliated business report.**

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Before March 1 each year, each title licensee shall submit a report to the division that:

(1) contains the following for the preceding calendar year:

(a) the name and address of any associate that owns a financial interest in the title licensee;

(b) for each associate identified under Subsection (1)(a), the percentage of the title licensee's affiliated business that is the result of an affiliated business arrangement with the associate;

(c) a description of any affiliated business arrangement the title licensee has with a person other than an associate identified under Subsection (1)(a);

(d) the percentage of the title's licensee's annual title insurance business that is affiliated business;

(e) proof of sufficient capital and net worth; and

(f) any other information required by the division by rule.

(2) is certified by an officer of the title licensee that the information contained in the report is true to the best of the officer's knowledge, information, and belief.

Section 6. Section 31A-23a-1105 is enacted to read:

### **31A-23a-1105. Investigations.**

(1) To enforce the provisions of this part, including Section 8 of RESPA, the division may conduct a public or private investigation within or outside of the state as the division considers necessary to determine whether a person has violated a provision of this part, including Section 8 of RESPA.

(2) For the purpose of an investigation described in Subsection (1), the division may:

(a) administer an oath or affirmation;

(b) issue a subpoena that requires:

(i) the attendance and testimony of a witness; or

(ii) the production of evidence;

(c) take evidence;

(d) require the production of a book, paper, contract, record, other document, or information relevant to the investigation; and

(e) serve a subpoena by certified mail.

(3) (a) A court of competent jurisdiction shall enforce, according to the practice and



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procedure of the court, a subpoena issued by the division.

(b) The division shall pay any witness fee, travel expense, mileage, or any other fee required by the service statutes of the state where the witness or evidence is located.

Section 7. Section 31A-23a-1106 is enacted to read:

### **31A-23a-1106. Disciplinary action.**

(1) Subject to the requirements of Section 31A-23a-1107, the division may impose a sanction described in Subsection (2) against a person if the person is:

(a) a title licensee or a person previously licensed as a title licensee for an act the person committed while licensed; and

(b) violates a provision of this part, including Section 8 of RESPA.

(2) The division may, against a person described in Subsection (1):

(a) impose an educational requirement;

(b) impose a civil penalty in an amount not to exceed \$5,000 for each violation;

(c) do any of the following to a title licensee:

(i) suspend;

(ii) revoke; or

(iii) place on probation;

(d) issue a cease and desist order; and

(e) impose any combination of sanctions described in this Subsection (2).

(3) (a) If the presiding officer in a disciplinary action under this part issues an order that orders a fine as part of a disciplinary action against a person, including a stipulation and order, the presiding officer shall state in the order the deadline, that is no more than one year after the day on which the presiding officer issues the order, by which the person shall comply with the fine.

(b) If a person fails to comply with a stated deadline:

(i) the person's license is automatically suspended:

(A) beginning the day specified in the order as the deadline for compliance; and

(B) ending the day on which the person complies in full with the order; and

(ii) if the person fails to pay a fine required by an order, the division may begin a collection process:

(A) established by the division by rule made in accordance with Title 63G, Chapter 3,

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Utah Administrative Rulemaking Act; and

(B) subject to Title 63A, Chapter 3, Part 5, Office of State Debt Collection.

(4) The division may delegate to an administrative law judge the authority to conduct a hearing under this part.

Section 8. Section 31A-23a-1107 is enacted to read:

**31A-23a-1107. Adjudicative proceedings -- Review -- Coordination with department.**

(1) (a) Before an action described in Section 31A-23a-1106 may be taken, the division shall:

(i) give notice to the person against whom the action is brought; and

(ii) commence an adjudicative proceeding.

(b) If after the adjudicative proceeding is commenced under Subsection (1)(a) the presiding officer determines that a title licensee has violated a provision of this part, including Section 8 of RESPA, the division may take an action described in Section 31A-23a-1106 by written order.

(2) In accordance with Title 63G, Chapter 4, Administrative Procedures Act, a person against whom action is taken under this part may seek review of the action by the executive director of the Department of Commerce.

(3) If a person prevails in a judicial appeal and the court finds that the state action was undertaken without substantial justification, the court may award reasonable litigation expenses to that individual or entity as provided under Title 78B, Chapter 8, Part 5, Small Business Equal Access to Justice Act.

(4) (a) An order issued under this section takes effect 30 days after the service of the order unless otherwise provided in the order.

(b) If a person appeals an order issued under this section, the division may stay enforcement of the order in accordance with Section 63G-4-405.

(5) (a) Except as provided in Subsection (5)(b), the division shall commence a disciplinary action under this chapter no later than the earlier of the following:

(i) four years after the day on which the violation is reported to the division; or

(ii) 10 years after the day on which the violation occurred.

(b) The division may commence a disciplinary action under this part after the time

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period described in Subsection (5)(a) expires if:

(i) (A) the disciplinary action is in response to a civil or criminal judgment or settlement; and

(B) the division initiates the disciplinary action no later than one year after the day on which the judgment is issued or the settlement is final; or

(ii) the division and the person subject to a disciplinary action enter into a written stipulation to extend the time period described in Subsection (5)(a).

(6) (a) Within two business days after the day on which a presiding officer issues an order under this part that suspends or revokes a title licensee's license, the division shall deliver written notice to the department that states the action the presiding officer ordered against the title licensee's license.

(b) Upon receipt of the notice described in Subsection (6)(a), the department shall implement the action ordered against the title licensee's license.

(7) Upon receipt of a notice described in Subsection (6), the department shall take the action described in the notice upon the title licensee's license.

Section 9. Section 61-2f-401 is amended to read:

### **61-2f-401. Grounds for disciplinary action.**

The following acts are unlawful for a person licensed or required to be licensed under this chapter:

(1) (a) making a substantial misrepresentation, including in a licensure statement;

(b) making an intentional misrepresentation;

(c) pursuing a continued and flagrant course of misrepresentation;

(d) making a false representation or promise through an agent, sales agent, advertising, or otherwise; or

(e) making a false representation or promise of a character likely to influence, persuade, or induce;

(2) acting for more than one party in a transaction without the informed consent of the parties;

(3) (a) acting as an associate broker or sales agent while not affiliated with a principal broker;

(b) representing or attempting to represent a principal broker other than the principal

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broker with whom the person is affiliated; or

(c) representing as sales agent or having a contractual relationship similar to that of sales agent with a person other than a principal broker;

(4) (a) failing, within a reasonable time, to account for or to remit money that belongs to another and comes into the person's possession;

(b) commingling money described in Subsection (4)(a) with the person's own money;

or

(c) diverting money described in Subsection (4)(a) from the purpose for which the money is received;

(5) paying or offering to pay valuable consideration, as defined by the commission, to a person not licensed under this chapter, except that valuable consideration may be shared:

(a) with a principal broker of another jurisdiction; or

(b) as provided under:

(i) Title 16, Chapter 10a, Utah Revised Business Corporation Act;

(ii) Title 16, Chapter 11, Professional Corporation Act; or

(iii) Title 48, Chapter 3a, Utah Revised Uniform Limited Liability Company Act, as appropriate pursuant to Section 48-3a-1405;

(6) for a principal broker, paying or offering to pay a sales agent or associate broker who is not affiliated with the principal broker at the time the sales agent or associate broker earned the compensation;

(7) being incompetent to act as a principal broker, associate broker, or sales agent in such manner as to safeguard the interests of the public;

(8) failing to voluntarily furnish a copy of a document to the parties before and after the execution of a document;

(9) failing to keep and make available for inspection by the division a record of each transaction, including:

(a) the names of buyers and sellers or lessees and lessors;

(b) the identification of real estate;

(c) the sale or rental price;

(d) money received in trust;

(e) agreements or instructions from buyers and sellers or lessees and lessors; and

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(f) any other information required by rule;

(10) failing to disclose, in writing, in the purchase, sale, or rental of real estate, whether the purchase, sale, or rental is made for that person or for an undisclosed principal;

(11) being convicted, within five years of the most recent application for licensure, of a criminal offense involving moral turpitude regardless of whether:

(a) the criminal offense is related to real estate; or

(b) the conviction is based upon a plea of nolo contendere;

(12) having, within five years of the most recent application for a license under this chapter, entered any of the following related to a criminal offense involving moral turpitude:

(a) a plea in abeyance agreement;

(b) a diversion agreement;

(c) a withheld judgment; or

(d) an agreement in which a charge was held in suspense during a period of time when the licensee was on probation or was obligated to comply with conditions outlined by a court;

(13) advertising the availability of real estate or the services of a licensee in a false, misleading, or deceptive manner;

(14) in the case of a principal broker or a branch broker, failing to exercise reasonable supervision over the activities of the principal broker's or branch broker's licensed or unlicensed staff;

(15) violating or disregarding:

(a) this chapter;

(b) an order of the commission; or

(c) the rules adopted by the commission and the division;

(16) breaching a fiduciary duty owed by a licensee to the licensee's principal in a real estate transaction;

(17) any other conduct which constitutes dishonest dealing;

(18) unprofessional conduct as defined by statute or rule;

(19) having one of the following suspended, revoked, surrendered, or cancelled on the basis of misconduct in a professional capacity that relates to character, honesty, integrity, or truthfulness:

(a) a real estate license, registration, or certificate issued by another jurisdiction; or

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(b) another license, registration, or certificate to engage in an occupation or profession issued by this state or another jurisdiction;

(20) failing to respond to a request by the division in an investigation authorized under this chapter within 10 days after the day on which the request is served, including:

(a) failing to respond to a subpoena;

(b) withholding evidence; or

(c) failing to produce documents or records;

(21) in the case of a dual licensed title licensee as defined in Section 31A-2-402:

(a) providing a title insurance product or service without the approval required by Section 31A-2-405; or

(b) knowingly providing false or misleading information in the statement required by Subsection 31A-2-405(2);

(22) violating an independent contractor agreement between a principal broker and a sales agent or associate broker as evidenced by a final judgment of a court;

(23) (a) engaging in an act of loan modification assistance that requires licensure as a mortgage officer under Chapter 2c, Utah Residential Mortgage Practices and Licensing Act, without being licensed under that chapter;

(b) engaging in an act of foreclosure rescue without entering into a written agreement specifying what one or more acts of foreclosure rescue will be completed;

(c) inducing a person who is at risk of foreclosure to hire the licensee to engage in an act of foreclosure rescue by:

(i) suggesting to the person that the licensee has a special relationship with the person's lender or loan servicer; or

(ii) falsely representing or advertising that the licensee is acting on behalf of:

(A) a government agency;

(B) the person's lender or loan servicer; or

(C) a nonprofit or charitable institution; or

(d) recommending or participating in a foreclosure rescue that requires a person to:

(i) transfer title to real estate to the licensee or to a third-party with whom the licensee has a business relationship or financial interest;

(ii) make a mortgage payment to a person other than the person's loan servicer; or

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(iii) refrain from contacting the person's:

(A) lender;

(B) loan servicer;

(C) attorney;

(D) credit counselor; or

(E) housing counselor;

(24) as a principal broker, placing a lien on real property, unless authorized by law; [or]

(25) as a sales agent or associate broker, placing a lien on real property for an unpaid

commission or other compensation related to real estate brokerage services[-]; or

(26) failing to timely disclose to a buyer or seller an affiliated business arrangement, as defined in Section 31A-23a-1101, in accordance with the federal Real Estate Settlement Procedures Act, 12 U.S.C. Sec. 2601 et seq. and any rules made thereunder.

Section 10. Repealer.

This bill repeals:

Section 31A-23a-503, Controlled business in title insurance.